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22 March 2019

## **THE FREEDOM OF ESTABLISHMENT AND FREE MOVEMENT OF SERVICES (EU EXIT) REGULATIONS 2019**

### **EU EXIT LEGISLATION – PROTOCOL WITH SCOTTISH PARLIAMENT**

Dear Gordon,

I am writing in relation to the protocol on obtaining the approval of the Scottish Parliament to the exercise of powers by UK Ministers under the European Union (Withdrawal) Act 2018 in relation to proposals within the legislative competence of the Scottish Parliament.

As you know, Mike Russell wrote to the Conveners of the Finance & Constitution and Delegated Powers & Law Reform Committees on 11 September 2018 setting out the Scottish Government's views on EU withdrawal. That letter also said that we must respond to the UK Government's preparations for a No-Deal scenario as best we can, despite the inevitable widespread damage and disruption that would cause. It is our unwelcome responsibility to ensure that devolved law continues to function on and after EU withdrawal.

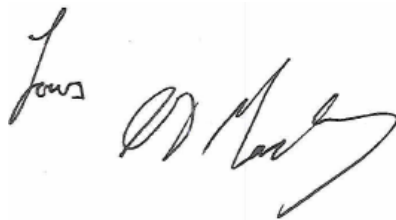
I attach a notification which sets out the details of the above SI which the UK Government propose to make and the reasons why I am content that Scottish devolved matters are to be included in this SI.

I am copying this letter to the Convener of the Delegated Powers and Law Reform Committee.

I look forward to hearing from you within 28 days from the date of this letter.

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A handwritten signature in black ink, appearing to read 'Derek Mackay', is centered at the top of the page.

**DEREK MACKAY**

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## NOTIFICATION TO THE SCOTTISH PARLIAMENT

### THE FREEDOM OF ESTABLISHMENT AND FREE MOVEMENT OF SERVICES (EU EXIT) REGULATIONS 2019

#### A brief explanation of law that the proposals amend

Article 49 of the Treaty on the Functioning of the European Union (TFEU) establishes the freedom of establishment and Articles 56 & 57 of the TFEU establish the free of movement of services (see Annex A).

The aim of these treaty articles is to develop the single market by breaking down barriers to cross-border trade within the EU, making it easier for EU nationals to be self-employed, own and manage a company, and provide services on a temporary basis in the UK (or any other Member State), without facing certain kinds of barriers.

The EU has bilateral or multilateral agreements which give rise to equivalent or similar directly effective rights of establishment and free movement of services, including Articles 31, 36 and 37 of the Agreement on the European Economic Area (EEA Agreement); Articles 4 and 5 of the Agreement between the European Community and its Member States and the Swiss confederation on the free movement of persons (Swiss Free Movement of Persons Agreement); and Articles 13 and 14 of the Agreement establishing an Association between the European Community and Turkey (Ankara Agreement) and Article 41 of the additional protocol.

These rights are examples of directly effective treaty rights (DETRs). DETRs are those provisions of EU treaties (or other treaties which are brought into domestic law by virtue of the European Communities Act 1972) which are sufficiently clear, precise and unconditional as to confer rights directly on individuals and which can be relied upon in national law without the need for implementing measures. These rights are being brought into UK law by section 4 the European Union (Withdrawal) Act 2018, and require to be disapplied by Statutory Instrument as part of no-deal preparations.

Articles 49 and 56 & 57 TFEU underpinned the Provision of Services Regulations (2009), and the Committee has previously agreed with my recommendation that the UK Government act on Scotland's behalf in respect of correcting deficiencies through The Provision of Services (Amendment etc.) (EU Exit) Regulations 2018.

#### Summary of the proposals and how these correct deficiencies

The proposed UK Statutory Instrument (SI) provides that the DETRs on freedom of establishment and services, noted above, which would continue as directly effective rights in domestic law by virtue of section 4 of the European Union (Withdrawal) Act 2018, should cease. The SI is made in exercise of powers conferred by section 8(1) of that Act and the relevant deficiencies being corrected fall within section 8(2)(a), (c) and 8(3)(a) of that Act.

The Ankara agreement, between the EU and Turkey, offers Turkish nationals a route to permanent residence in an EU country following setting up a business and a period of

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independent economic activity in that country. Similar provision applies to Swiss nationals in the Swiss Agreement. The draft SI shown to Scottish Government officials includes reference to this agreement and disapplies rights of establishment and free movement of services except in so far as they have a direct impact on the immigration regimes applied to Swiss nationals and Turkish nationals. The UK government has explained that they are ‘carving out’ the disapplication of these rights in so far as there is a direct impact on the immigration regime applied to Turkish and Swiss nationals. Our understanding is that the Home Office will implement a no-deal approach in this policy area.

## **An explanation of why the change is considered necessary**

In a ‘no deal’ scenario, and post-Exit, the rights provided for in these Articles would not be reciprocated by EU Member States. They may be inoperable within the UK as the UK would no longer be an EU Member State, and it is considered that the SI is required for the sake of legal clarity.

To the extent that the rights would have any practical application, the SI will also assist the UK in complying with its obligations under World Trade Organisation rules. This will have the effect in a no-deal scenario, of EU/EEA service providers providing services in the UK being treated the same as any other third country provider.

The DETRs, as retained in UK law after Exit Day, would therefore not operate effectively and require to be disapplied to reflect the fact that the UK will no longer be a member state of the EU.

## **Scottish Government categorisation of significance of proposals**

**This proposal has been assessed as being category A on the basis that the proposals have the following characteristics that are associated with Category A:**

- Minor and technical in detail;
- Proposals necessary for continuity where there may be a minor policy change, but limited policy choice and an “obvious” policy answer;
- Updating references which are no longer appropriate once the UK has left the EU, such as provisions which refer to “member states other than the United Kingdom” or to “other EEA states”.

## **Impact on devolved areas**

The Regulations will disapply specified directly effective rights and relate to both devolved and reserved matters. That is, to the extent that the Scottish Parliament is not constrained by EU law (which it will not be post EU-exit), it could disapply these rights to the extent that they relate to devolved matters in Scotland. For example, in the context of the freedom of establishment, the freedom of a farmer to establish business in Scotland does not relate to reserved matters and accordingly would be a devolved matter.

As the DETRs touch on both reserved and devolved matters, if the Scottish Government made separate devolved provision, the amendments made by the UK Government would

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have to extend to Scotland so far as they concerned the establishment and provision of services in reserved areas.

We believe that trying to proceed by two separate sets of legislation with provisions in each case restricting application to reserved or devolved matters would introduce unnecessary complexity for service providers.

## **Summary of stakeholder engagement/consultation**

Following engagement across Whitehall departments, the UK Government have identified one policy area where the disapplication of the DETRs will have a direct impact on substantive reserved policy – the use of satellite decoder cards imported from the EU.

The European Court of Justice ruled that national restrictions on the use of legitimate satellite decoder cards from another EU country were not compatible with Articles 56 of the Treaty on the Functioning of the European Union on the freedom to provide services.

As a result, Section 297 of the Copyright, Designs and Patents Act 1988, which makes it an offence to 'dishonestly receive' a programme included in a broadcast made from the UK with the intent of avoiding a charge – e.g. by accessing the programme via a cheaper broadcasting service intended for a non-UK audience, does not currently apply to the use of such decoder cards, even where an offence would otherwise be committed under the Act.<sup>[1]</sup>

Disapplying the services/establishment DETRs would therefore remove that exception: using a legitimate EU satellite decoder card with the intention to 'dishonestly receive' such a programme with the intent of avoiding a charge would therefore be considered an offence. However, UK Government officials do not believe that use of these cards is widespread, and it is not an issue that consumers or copyright owning stakeholders have raised.

## **A note of other impact assessments, (if available)**

BEIS have advised that as they believe these DETRs may be inoperable after Exit, the risk of successful challenge is low. However, the scale of potential challenges, given the cross-cutting nature of these DETRs, could be burdensome if sufficient clarity about their status is not given. 'Switching off' these DETRs makes the position clear and greatly reduces the possibilities for bringing challenges.

As noted above, these DETRs underpin the Provision of Services Regulations (2009). In relation to The Provision of Services (Amendment etc.) (EU Exit) Regulations 2018, the Department for Business, Energy and Industrial Strategy engaged with Competent Authorities across the UK to outline the 'no-deal' policy approach to remove preferential access to EEA states and to test what possible impacts could be caused from this change.

Findings of this engagement activity showed that, by and large, Competent Authorities do not currently discriminate against service providers based on nationality. Therefore, access

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<sup>[1]</sup> FA Premier League v QC Leisure and others (C-403/08) and Karen Murphy v Media Protection Services (C-429/08)

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to the UK services market currently places very few barriers against third country service providers, if any. As a result, Competent Authorities would have to undertake limited action to adapt their licensing and authorisation schemes to a 'no-deal' scenario. As this exercise has already been undertaken, no further action would be required to be by Competent Authorities as a result of the disapplication of these DETRs.

## **Summary of reasons for Scottish Ministers proposing to consent to UK Ministers legislation**

There is little scope under the powers in the European Union (Withdrawal) Act 2018 for policy enhancements in amending the Regulations, and no powers are returned to the UK as a result of the amendment.

BEIS and the Scottish Government agree that amendments to the Regulations are to a large extent only technical fixes, important for the sake of clarity, and a joint approach would improve ease of use of amended legislation for businesses and consumers alike.

To the extent that the DETRs would have practical application, a failure to correct deficiencies could potentially leave Scotland and the UK in breach of WTO rules on preferential access to markets.

Working with the UK Government will ensure that the simplest route to correcting deficiencies is taken.

The Scottish Government believe that using a UK-wide SI to resolve these legislative deficiencies is not prejudicial to Scottish interests.

The SI is still in final drafting stages, but BEIS have consulted with the Devolved Administrations throughout the process and addressed concerns raised by each Administration, including the relationship between these DETRs and both devolved and reserved matters. However, I will write to the Committee at the earliest available opportunity with the Scottish Government's assessment of whether the SI as laid by the UK Government matches the policy intention set out in this notification.

## **Intended laying date (if known) of instruments likely to arise**

BEIS have confirmed that they will not put affirmative instruments forward for debate that have not been consented by Scottish Ministers and agreed by the Scottish Parliament under the protocol.

## **If the Scottish Parliament does not have 28 days to scrutinise Scottish Minister's proposal to consent, why not?**

n/a

## **Information about any time dependency associated with the proposal**

n/a

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**Are there any broader governance issues in relation to this proposal, and how will these be regulated and monitored post-withdrawal?**

n/a

**Any significant financial implications?**

There are no financial implications for the Scottish Government as a result of this SI. We do not believe that there will be significant financial implications for stakeholders as a result of this SI.

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**ARTICLES FROM THE CONSOLIDATED VERSION OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION****Article 49 (ex Article 43 TEC)**

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

**Article 56 (ex Article 49 TEC)**

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.

**Article 57 (ex Article 50 TEC)**

Services shall be considered to be "services" within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

"Services" shall in particular include:

- (a) activities of an industrial character;
- (b) activities of a commercial character;
- (c) activities of craftsmen;
- (d) activities of the professions.

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Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

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